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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JOHN SMITH etc. et al.,

Plaintiffs and Appellants,

v.

MANHATTAN WEIGHT CONTROL
MEDICAL CENTER, INC. et al.,

Defendants and Respondents.

B167070

(Los Angeles County
Super. Ct. No. YC030396)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Victor E. Chavez, Judge. Affirmed.

Law Office of Mark Ravis & Associates and Mark Ravis for Plaintiffs and
Appellants.

Horvitz & Levy, David M. Axelrad and Tracy L. Turner; Tuverson & Hillyard
and Steven D. Hillyard for Defendants and Respondents.

John Smith, Jeffrey Smith and Michelle Smith appeal from the judgment entered in favor of defendants Manhattan Weight Control Medical Center, Inc., and Dr. Don Jensen after a jury returned a defense verdict in this medical malpractice wrongful death action. For the reasons set forth below, we affirm the judgment.

FACTS AND PROCEDURAL HISTORY¹

Mary Smith died of sudden heart failure in September 1996, 13 months after beginning a weight loss program for obesity at the Manhattan Weight Control Medical Center (Manhattan). She was 35. As part of her weight loss treatment, Smith was prescribed phentermine, a stimulant used as an appetite suppressant. An autopsy revealed that Smith had a severe case of coronary artery disease, with one of her coronary arteries as much as 95 percent blocked. Smith's husband, John Smith, and children, Jeffrey and Michelle Smith, sued Manhattan and its founder, Dr. Don Jensen, contending that they killed Smith by negligently overprescribing phentermine.²

Several medical experts testified at trial on behalf of both parties. Appellants' experts testified that phentermine contributed to Smith's death while Manhattan's experts held a contrary opinion. The jury returned a special verdict finding that Manhattan had breached the standard of care, but that its negligence did not cause Smith's death. Judgment for Manhattan was then entered. Appellants contend that the defense evidence

¹ In accord with the usual rules on appeal, we state the facts in the manner most favorable to the judgment. (*Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 755, fn. 2.)

² We will refer to John, Jeffrey, and Michelle Smith as "appellants." When we refer to Manhattan, we include Dr. Jensen where applicable. Appellants sued others as well, including Bayshores Healthcare Medical Group, which allegedly examined Smith before she began treatment at Manhattan and failed to discover her coronary artery disease. Bayshores and the other defendants apparently settled with appellants before trial and were dismissed from the action.

was insufficient to show a lack of causation and ask that we hold that the evidence as a whole established causation as a matter of law.

DISCUSSION

Appellants had to establish a reasonable medical probability that phentermine was a cause of Smith's death. A reasonable medical probability exists when, in the absence of other reasonable explanations, it becomes more likely than not that the injury was the result of a defendant's conduct. A mere possibility is not enough. (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117.) If the probabilities are evenly balanced, the jury cannot find causation. (*Id.* at p. 1118.) In attempting to show that Manhattan's evidence was so weak that they established causation as a matter of law, appellants have violated a fundamental rule of appellate practice: they have failed to set forth, analyze, or discuss all the evidence at trial, including evidence unfavorable to them. (*Oliver v. Board of Trustees* (1986) 181 Cal.App.3d 824, 832.)

At page 7 of their brief, appellants state that "virtually the *only* evidence offered to support the verdict was the testimony of [two doctors] that persons with significant blockage of a coronary artery sometimes die suddenly. That's all of it." (Italics original.) Even a cursory examination of the record, however, reveals that that was not all of it. Dr. Joseph Sherger, the dean of the medical school at Florida State University, had specialized knowledge of obesity. According to him, phentermine was not associated with sudden death. Instead, according to him, the arrhythmia that killed Smith was caused by her preexisting coronary artery disease and phentermine played no part in her death. Dr. Robert Chesne, who is the chief of the Tommy Lasorda Heart Center at Centinela Hospital, gave similar testimony. Dr. Michael Fishbein, a professor at the UCLA Medical Center with an expertise in autopsies also testified that phentermine played no part in Smith's death, which was caused solely by her coronary artery disease.

Appellants' brief recounts the testimony of the physician who actually performed Smith's autopsy. According to that physician, phentermine in fact contributed to Smith's

death. Appellants failed to mention, however, that when the witness was cross-examined, he admitted that he could not state whether it was more likely than not that phentermine played a part in Smith's death. In addition, appellants have failed to support most of their factual assertions with citations to the record. (Cal. Rules of Court, rule 14(a)(1)(c).) We therefore deem waived appellants' substantial evidence issue. (*Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1301 [no record citations]; *Oliver v. Board of Trustees, supra*, 186 Cal.App.3d at p. 832 [no mention of unfavorable evidence].)

We alternatively hold on the merits that there was sufficient evidence to support the verdict. While appellants challenge certain supposed gaps in the defense experts' testimony, these amount to no more than conflicts in the evidence, which the jury was free to resolve. (*Hagy v. Allied Chemical & Dye Corp.* (1953) 122 Cal.App.2d 361, 375.)³ Because there was medical defense testimony that phentermine does not cause sudden death and played no role in Smith's death, there was sufficient evidence to support the jury's verdict.

DISPOSITION

³ Appellants' brief actually discussed only one supposed evidentiary gap—that Dr. Fishbein's opinions were based on a study involving lower doses of phentermine than were given to Smith. Appellants failed to mention that on redirect examination, Fishbein clarified that the study involved average doses less than Smith's, but included persons taking much higher doses as well.

For the reasons set forth above, the judgment is affirmed. Respondents to recover their costs on appeal.

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RUBIN, J.

We concur:

COOPER, P.J.

BOLAND, J.